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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HILLEL CHODOS,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Appellant.

B208161

(Los Angeles County
Super. Ct. No. BC373860)

APPEALS from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Judgment affirmed; appeal by Wells Fargo Bank dismissed.

Hillel Chodos, in pro. per., for Plaintiff and Appellant.

Barton, Klugman & Oetting and Ronald R. St. John for Defendant and Appellant.

After a court trial on a declaratory relief claim, judgment was entered in favor of plaintiff Hillel Chodos and against Wells Fargo Bank (Bank) for approximately \$8,400 plus interest, based on findings that Chodos was the successor trustee to his mother's trust, and that upon her death, Chodos was entitled to immediate possession and use of the funds in her checking account at Bank. Both Chodos and Bank appeal from the judgment.

Chodos challenges a pretrial order sustaining Bank's demurrer to his tort claim for conversion. He seeks the reversal of the judgment with directions to permit a jury trial on his conversion claim. Bank seeks a reversal of the judgment and a new judgment entered in its favor on the ground that a declaratory relief action was not available to Chodos, who should have brought a proceeding in probate to determine ownership of the account. We dismiss Bank's appeal on mootness grounds because it satisfied the judgment in favor of Chodos. We affirm the order sustaining the demurrer to the conversion claim because the right of a depositor, or the depositor's successor in interest or personal representative, to funds in a general deposit account with a bank is an intangible interest not subject to a tort claim for conversion.

BACKGROUND

Because the only issue on Chodos's appeal is whether the complaint states a cause of action for conversion, we set out the allegations of the complaint as well as those facts that are undisputed.

Chodos's mother, Judith Chodos (Judith), died on February 2, 2007. For many years before her death, Judith owned a checking account at Bank. Bank records indicated the account was held by Judith as a sole individual account. In October 2006, Judith executed (1) an instrument creating a living trust, of which she was the sole trustee during her lifetime, and upon her death, Chodos was to become the sole successor trustee; (2) a document titled Transfer of Assets, transferring all of her property to her trust; and (3) a will providing that any property owned at her death and not transferred to the trust was bequeathed to Chodos, as successor trustee, to be distributed in accordance with the provisions of her trust.

After Judith's death, Chodos notified Bank by telephone of his status as successor trustee and requested that Bank close the account and pay the funds in the account to him. Bank refused to pay the funds to Chodos and insisted that he could only obtain the funds by completing an affidavit for small estate distributions (Prob. Code, § 13100 et seq.). Chodos wrote to Bank that the form affidavit could not truthfully be completed because it included some inappropriate provisions, including a statement that more than 40 days had elapsed since Judith's death when fewer than 40 days had elapsed. Chodos also contended that the "Collection of Small Estates Act"¹ was not applicable or pertinent to his demand from Bank. Chodos included in his letter a copy of his mother's death certificate and pertinent portions of his mother's trust instrument and will. Chodos attempted to contact Bank's legal department, but none of Bank's lawyers would speak with him. Chodos wrote to Bank again in June but Bank did not respond. Bank continued to "retain possession and control" of Chodos's funds.

On July 7, 2007, Chodos filed a complaint for damages for conversion against Bank. Bank's demurrer was sustained and Chodos was granted leave to amend. He filed a first amended complaint for declaratory relief. After a court trial in April 2008, a judgment was entered in favor of Chodos entitling him to immediate possession and use of the funds in the checking account plus prejudgment interest of 10 percent. In June 2008, Chodos filed an acknowledgement of satisfaction of judgment. Both Chodos and Bank appealed from the judgment.

DISCUSSION

"Conversion is generally described as the wrongful exercise of dominion over the personal property of another." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) "Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in,

¹ We infer that Chodos is referring to division 8, part 1 of the Probate Code, (beginning with Probate Code section 13000), which part is titled "Collection or Transfer of Small Estate Without Administration."

something tangible. (*Adkins v. Model Laundry Co.* (1928) 92 Cal.App. 575, 583 [business goodwill]; *Olschewski v. Hudson* (1927) 87 Cal.App. 282, 286-288 [competitor's customer route]; *Faircloth v. A.L. Williams & Associates* (1992) 206 Ga.App. 764 [426 S.E.2d 601, 604-605] [unpaid commissions not evidenced by a receipt or certificate]; *Matzan v. Eastman Kodak Co.* (1987) 134 A.D.2d 863 [521 N.Y.S.2d 917, 918] [no protected interest in an idea].) And Dean Prosser has cautioned against scuttling conversion's tangibility requirement altogether, recommending instead the use of other remedies to protect intangible interests. (Prosser & Keeton on Torts [(5th ed. 1984)] § 15, p. 92.)” (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1565 [court did not reach issue of whether unauthorized use of access and authorization codes to make long distance phone calls constituted a conversion and upheld jury verdict on trespass theory].)

““It has long been regarded as “axiomatic that the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor.” [Citation.] “A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such.” [Citation.] [Citation.] Accordingly, banks ‘are not fiduciaries for their depositors.’ [Citation.] [¶] ‘The relationship of bank and depositor is founded on contract,’ [citation] which is ordinarily memorialized by a signature card that the depositor signs upon opening the account. (2 Cal. Commercial Law (Cont.Ed.Bar June 1992 update) §§ 8.1 to 8.3, p. 143.)” (*Chazen v. Centennial Bank* (1998) 61 Cal.App.4th 532, 537.)

“““When money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with the other funds of the bank, the relation of debtor and creditor is created between the bank and the depositor, and the deposit is general. In such a transaction the bank becomes the owner of the fund. . . .””” (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 858.) “Where the deposit is general, the bank may use deposited funds to its own profit. ‘. . . Such a deposit is in effect a loan to the bank. [Citation.] Title to the deposited funds passes immediately to the bank which may use the funds for its own business purposes. [Citations.] The bank

does not thereby act as trustee and cannot be charged with converting the deposit to its own use. [Citations.] It is, however, obligated to pay the debt reflected by the balance of the deposited funds upon its depositor's demand. [Citations.]' [Citation.]" (*Ibid.*)

"Although there appears to be no comprehensive definition of intangible property (Cowdrey, *Software and Sales Taxes: The Illusory Intangible* (1983) 63 B.U.L. Rev. 181, 200-203), such property is generally defined as property that is a 'right' rather than a physical object. (*Roth Drug, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 734; Black's Law Dict. (6th ed. 1990) p. 809, col. 1.) As the court in *Roth Drug, Inc. v. Johnson*, *supra*, 13 Cal.App.2d at page 734 observed: 'Tangible property is that which is visible and corporeal, having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuities and the like.' An intangible right may be evidenced or represented by a physical object such as a promissory note or a certificate of stock. When an intangible right is so represented, the physical object representing the particular right, while capable of perception by the senses, is nevertheless considered intangible property for tax purposes. Thus, for purposes of the law of taxation, intangible property is defined as including personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences. [Citations.]" (*Navistar Internat. Transportation Corp. v. State Bd. of Equalization* (1994) 8 Cal.4th 868, 875 [company's trade secrets and other intellectual works were tangible personal property for purposes of sales tax].)

In light of the foregoing authorities, we conclude that the debt that a bank owes to its customer with respect to funds in a general deposit account constitutes a contract right. Such right is an intangible asset and not within the class of property that may be the subject of a tort action for conversion. Chodos suggests that because the account holder, Judith, died, and because he did not have any contractual relationship with Bank, his rights with respect to Bank are not governed by the foregoing principles. We reject his argument because it is not supported by any pertinent authority.

We dismiss Bank's appeal because Bank paid the judgment in favor of Chodos and its appeal is now moot. (*Rancho Solano Master Assn. v. Amos & Andrews, Inc.* (2002) 97 Cal.App.4th 681, 688.)

DISPOSITION

The judgment is affirmed. The appeal filed by Wells Fargo Bank is dismissed. The parties are to bear their own costs on appeal.

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MALLANO, P. J.

We concur:

ROTHSCHILD, J.

TUCKER, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.